



IP Literature Watch

CRA Charles River
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This newsletter contains an overview of recent publications concerning intellectual property issues. The abstracts included below are as written by the author(s) and are unedited.

IP & Antitrust

Patent pool outsiders

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Berkeley Technology Law Journal, Vol. 33, No. 1, 2018, Forthcoming
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3012633

Individuals who decline to join cooperative groups — outsiders — raise concerns in many areas of law and policy. From trade policy to climate agreements to class action procedures, the fundamental concern is the same: a single member of the group who drops out could weaken the remaining union. This Article analyzes the outsider problem as it affects patents.

The outsider question has important bearing on patent and antitrust policy. By centralizing and simplifying complex patent licensing deals, patent pools conserve tremendous transaction costs. This allows for the widespread production and competitive sale of many useful technologies, particularly in the consumer electronics industry. Because these transaction cost savings appear to outweigh the most common competition-related concerns patent pools raise, antitrust authorities generally view these private pools favorably.

Others are less sanguine. Most patent pools are incomplete: for the technologies they cover, not all relevant patents are included. The reason for this is understandable: patent holders sometimes believe they can negotiate for higher royalties by declining to join an existing pool. Antitrust regulators are aware of this behavior, but do not worry much about it. A growing number of economists and legal scholars believe, however, that this outsider behavior may impose higher costs on pool licensees, detracting from the central benefit that patent pools offer — transaction cost savings. These commentators urge antitrust regulators to regard patent pools with greater caution and skepticism.

These calls for caution, however, are based mostly on theories about how patent pools should work, rather than empirical study. Remarkably, little research has been done to shed light on the actual impact of patent pool outsiders. Through an original ethnographic study, this Article seeks to remedy this gap. A set of the most notable and public episodes of outsider behavior were collected from industry press

reports, case reports, and historical archives. Crucial new information was then gathered through interviews with lawyers and executives directly involved with the episodes studied.

The study reveals a characteristic of patent pools that has gone unappreciated until now: they subtly but powerfully influence bargains that take place “poolside” — i.e., deals between patent holders and licensees that take place “in the shadow” of the pool. This spill-over effect can beneficially limit the power that theorists have assumed outsiders to have. This is an unappreciated benefit of cooperation. The theorists, as it turns out, have not used the wrong approach, but rather, have been missing some important parameters.

To further aid regulators, this Article builds upon its qualitative findings by introducing a new quantitative technique for estimating the cost that a licensee either incurs or saves due to an outsider. Applying this technique to original financial and industry data gathered from research subjects, this Article shows that, counterintuitively, patent licensees are sometimes better-off where cooperation among licensors is partial, rather than complete. The inflection point lies where the royalty rate hike that a unified pool would need to charge to draw in an outsider is equal to the transaction costs that licensees would conserve by dealing with a single pool.

This study’s revelations have provocative implications that reach beyond patent law. Contrary to conventional wisdom, slightly fragmented property markets may sometimes be preferable to “grand coalitions.” There may exist in any given market for complementary patent rights (or other complementary property rights), an optimal level of diffusion of ownership that resides between total diffusion and total concentration. Some cooperation may not only be better than none, but also better than more.

Drawing upon this study, antitrust regulators who must evaluate patent pools can assemble a clearer and more complete understanding of their overall costs and benefits — a topic that Robert Merges and I recently wrote on in a related article. This Article is also helpful beyond patent law. The ethnographic methodology followed here reveals dynamics between outsiders and groups that theory alone has not captured. Scholars concerned with outsiders in other areas of law and policy can refine and build upon theory by applying a similar ethnographic approach.

Righting the course: what the DOJ should do about the IEEE Business Review Letter

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George Mason Law & Economics Research Paper No. 17-34

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3018624

Standard-development organizations (SDOs) “vary widely in size, formality, organization and scope,” and therefore individual SDOs may need to adopt different approaches to meet the specific needs of their members. Critically, to balance the needs of both contributors and implementers, SDO policies must be developed through transparent and consensus-based processes. Issuance of best practices by a government agency may unduly influence private SDOs and their members to adopt policies that might not otherwise gain consensus support within a particular SDO and that may not best meet the needs of that SDO, its members, and the public. Accordingly, the U.S. antitrust agencies have taken the position that they do “not advocate that [SDOs] adopt any specific disclosure or licensing policy, and the [a]gencies do not suggest that any specific disclosure or licensing policy is required.”

Global markets, competition, and FRAND royalties: the many implications of Unwired Planet v. Huawei

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16 Antitrust Source 17(1) (Aug. 2017)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3017850

The recent UK decision in *Unwired Planet v. Huawei* addresses, for the first time, several key issues arising from the international nature of SEP licensing transactions and the manner in which national court decisions can impact global business and litigation strategies. The court's analysis is deeply rooted in competition law principles, often at the expense of the contractual underpinnings of the FRAND commitment. Most importantly, the court's willingness to establish global license terms covering patents outside the UK has serious implications for international commercial litigation and licensing transactions.

The legal framework for SEP disputes in EU Post-Huawei: whither harmonization?

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TILEC Discussion Paper No. 2017-032

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3017102

This article revisits the antitrust treatment of unilateral conduct in Standard Essential Patent (SEP) disputes in EU, with particular focus on the landmark CJEU judgment in *Huawei v ZTE* and the way it has affected subsequent developments before national courts. It illustrates that while the Court in *Huawei* significantly improved legal certainty both for SEP holders and their potential licensees, it also left open a number of crucial questions affecting everyday's licensing practice. First, it is not entirely clear whether the liability of an SEP holder presupposes leveraging by a vertically integrated firm or can also arise in purely vertical or horizontal relationships. Secondly, the safe harbor procedure formulated in the judgment begs important questions concerning burden of proof and portfolio licensing, which have given rise to divergent interpretations. It follows that the space remains wide open for competing national and even regional approaches to the rights and obligations of SEP holders, calling for further European harmonization - be it judicially, legislatively, or administratively through the European Commission. In support for the latter measures, the article illustrates the limited remit of EU private international law rules in preventing the forum shopping which is likely to unfold as a result of a fragmented landscape for the resolution of SEP disputes.

Injunctions for standard-essential patents in the European Union

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Working paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3013138

Injunctions for standard essential patents (SEPs) — that is, patents that are essential to practice an industry standard — have been at the center of the antitrust debate for more than a decade. In July 2015, the Court of Justice of the European Union (CJEU) issued its long awaited decision in *Huawei Technologies. Co. v. ZTE Corp.*, in which it addressed, for the first time, the question of whether an SEP holder's request for an injunction could violate Article 102 of the Treaty on the Functioning of the European Union (TFEU) — the provision of EU competition law that prohibits a dominant company from abusing its market position. In this article, I analyze the implications of the CJEU's judgment for SEP holders that seek to enforce their SEPs in the European Union. *Huawei* confirmed that an SEP holder faces a stricter level of antitrust scrutiny in the European Union than in some other jurisdictions, such as the United States. In practical terms, however, the developments that followed *Huawei* showed that the

judgment limited Article 102 TFEU's scope in addressing an SEP holder's behavior, when compared with the approach that the European Commission had adopted in its previous investigations. After Huawei, an SEP holder's request for an injunction is less likely to trigger antitrust liability under Article 102 TFEU. In addition, Huawei raised the barrier that an SEP holder must overcome to obtain an injunction. Yet, the requirements established in Huawei are not so strict as to preclude obtaining that remedy. Unlike in the United States, where, as of August 2017, no SEP holder has obtained an injunction, several SEP holders have requested and obtained injunctions against infringers in the European Union.

Filling Huawei's gaps: the recent German case law on standard essential patents

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European Competition Law Review (Forthcoming)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3017072

The Huawei ruling identified the steps that owners and users of SEPs will have to follow in negotiating a FRAND royalty. Compliance with the code of conduct will shield patent holders from the gaze of competition law and, at the same time, will protect implementers from the threat of an injunction.

The licensing framework provided by the CJEU is aimed at increasing legal certainty and predictability for the whole standardisation environment. Nevertheless, the judgment has been criticised because a relevant number of issues are left unresolved. In this scenario the activities of national courts in filling the gaps left by the CJEU deserve the utmost consideration. This paper will seek to explore the approach developed at national level post Huawei, focusing on the German judicial experience.

SEP holder's right to injunction shall not be lightly deprived

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China Patents and Trademarks, Vol. 2, Page 83-100, 2017

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3010761

The 2017 Beijing High Court Patent Infringement Guidelines' rule of "no injunction as a principle for SEP holders" has been premised on two "it" theories, i.e. the patent hold-up and royalty stacking conjectures, which still need to be judged by their predictive power in the real world. For the past two decades these conjectures did an unsatisfying job in this respect – despite grand appearance at first sight, empirical support of a stagnant market for SEP-intensive industries is still in serious lacking. As direct variants of classical transaction cost economics hold-up theory and the Cournot Complement problem, the conjectures also seem to be inconsistent with the established theories. From a historical and comparative law's perspective, occasional patent hold-up is by no means a new phenomenon limited to the standard setting. It is entirely possible that the patent system is imperfect, with frictions or loopholes happening from time to time. But there is a significant distinction between acknowledging occasional overcharging behavior (frictions or loopholes), and concluding that a systematic market failure has been resulted, or will be resulted absent taking aggressive "reforms" departed from the classical rule. For the former, comparative law teaches us that patent law has been functioning pretty well in the past hundreds of years, and absent the latter, aggressive departures from a fundamental notion of a well - working patent system, for example in the form of "no injunction by principle" rule, is simply wrong. Market mechanism with carefully and finely tuned rules has largely proved itself to be capable in dealing with occasional hold-ups, and without substantial empirical evidence to the contrary, policy makers in China should not be frightened into making overzealous changes.

IP & Licensing

Tying, exclusivity, and standard-essential patents

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Columbia Science and Technology Law Review, Forthcoming

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When a technological standard is adopted, implementers must pay to license all “standard-essential” patents (SEPs)—those covering core features of the standard—although the particular price terms usually cannot be negotiated beforehand. To allay implementers’ fear of being “held up,” SEP owners usually make commitments to offer licenses on “fair, reasonable, and nondiscriminatory” (FRAND) terms. Among other things, this acts as a contractual price control for SEP licenses—albeit an imprecise one that is subject to judicial interpretation.

Aside from licenses, an SEP holder may further supply an important “collateral input”—one that is not subject to the FRAND pledge, but which implementers nevertheless require in order to market a viable product. For example, this might be a physical component of the final product. The SEP holder might tie its SEP rights to the collateral input. It might also engage exclusive dealing or related practices, such as a “loyalty discounting” arrangement that imposes larger royalties on implementers who buy the input from competing providers. Importantly, FRAND’s operation as a price control significantly alters the economic analysis: here the primary impetus for tying may be to circumvent the price control by shifting the desired overcharge to the tied good—a concern that does not arise when a seller has complete autonomy over its pricing (as is usually the case). The natural result may be to foreclose competitors’ input sales.

Such restraints have received little attention in the FRAND literature, but they are an emerging concern for innovation and competition policy. They have recently been attacked in two high-profile complaints filed against Qualcomm—one by the Federal Trade Commission, and the other by Apple. Against this backdrop, this article provides a legal and economic evaluation of tying and exclusive dealing arrangements in FRAND licensing. Such practices may act to undermine the FRAND price control, potentially violating the SEP holder’s commitment. The case for antitrust intervention is harder to make, but in principle the arrangement could act to exclude actual or potential competition in the collateral input market, bringing it within antitrust’s reach. I conclude by offering several policy recommendations for how courts and standard setting organizations might address these tying and exclusivity arrangements.

The first compulsory licensing of patents and copyright

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David J Brennan (2017) 17 Legal History 1-45

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3012345

This article explains how compulsory licensing for intellectual property originated in British law in the 19th Century and the early part of the 20th Century for both patents and copyright. It is a history that is intricate, straddling the two regimes that comprise the main pillars of intellectual property, and requires consideration of contemporaneous developments occurring in the USA, North American colonies and Continental Europe. Through its exposition and analysis of the first five distinct compulsory licensing regimes, some concluding observations are made about the triggers for the first compulsory licenses and the conditions that might help predict the desirability of compulsory licensing as a matter of modern public policy in any given setting.

IP & Innovation

The role of effective control systems on corporate innovation

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Kelley School of Business Research Paper No. 17-57

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3013355

This study examines the role of effective control systems on corporate innovation. Although effective control systems are likely to improve tracking mechanisms allowing managers to better identify and patent their most valuable intellectual property, these same control systems may also create an overly restrictive bureaucratic environment that may impede creativity and innovation. Our evidence suggests that more effective control systems are associated with more innovation (i.e., number of patents, market value of patents, and patent citations). A series of additional tests further mitigates potential concerns that firm characteristics are influencing our results including the use of firm fixed effects, remediation tests, and entropy balancing. To provide better identification that our results are driven by internal controls, we take advantage of a regulatory shock to firms' internal control systems and find that firms affected by the regulation have greater innovation than those unaffected by the regulation. Overall, the results of our study suggest that higher quality control systems are positively associated with innovation.

Firm innovation under import competition from low-wage countries

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CESifo Working Paper Series No. 6569

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3014765

In recent years, manufacturing firms in the United States have faced increasing import competition from low-wage countries, especially China. Does this competition hurt or help innovation by firms? This paper studies the effect of the surge in imports from China on innovation in the US manufacturing sector. We combine patent, firm and trade data during 1990-2006 for US publicly-listed firms in the Compustat dataset. We find consistent evidence that Chinese import competition had a positive effect on firm innovation, as measured by citation-weighted patent applications. This positive effect persists when we instrument import competition in the US by using Chinese import penetration in the United Kingdom. Next we investigate this relationship between import competition and innovation by considering industry and firm heterogeneity. We find that firms in low-tech industries and those with a lower degree of product differentiation show a significant positive response to import competition. Firms with a higher capital intensity and lower labor productivity also exhibit a greater response. These results are shown to be robust to a variety of measures for import penetration and innovation.

IP & Litigation

Which Supreme Court cases influenced recent Supreme Court IP decisions? A citation study

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University of Georgia School of Law Legal Studies Research Paper No. 2017-22

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3012262

The U.S. Supreme Court has decided an increasing number of intellectual property cases — especially patent cases — over the last several terms. Which prior cases influence the stated reasoning in these recent Supreme Court IP cases? A handful of citation studies of supreme courts in the U.S., both state and federal, conducted over the last 40 years suggest that the Court would most often cite its own prior cases; that it would cite its more recent cases more often than its older cases; and that a small number of its prior cases would receive a large share of the citations, with most of its prior cases cited one or two times, if at all. In this unique empirical study of all the Supreme Court's IP cases from October Term 1994 through October Term 2016, inclusive, all the predicted patterns hold true. In addition to reporting citation-pattern data, I use network analysis tools first developed to study social networks, and subsequently validated for use with citation networks in judicial opinions, to identify, rank, and visualize the interconnections among, the top case law authorities in the Supreme Court's recent IP cases.

The incredible shrinking victory: *Eli Lilly v. Canada*, success, judicial reversal, and continuing threats from pharmaceutical ISDS

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Northeastern University School of Law Research Paper No. 296-2017

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3012538

On March 16, 2017, a three-member arbitration tribunal, instituted pursuant to the North American Free Trade Agreement (NAFTA) Investment Chapter, delivered its investor-state-dispute settlement (ISDS) decision in *Eli Lilly v. Canada*, dismissing the pharmaceutical giant's claims and awarding \$5 million in costs and legal fees to the Canadian government. After a five-year battle, with over \$15 million in attorney and expert witness fees, Canada's victory was hardly "resounding" because of the continuing threat and deterrent effect of this and other intellectual property-based investor-state arbitrations. But the eagerly awaited decision did effectively torpedo Eli Lilly's specific compensation claims. The tribunal rejected Eli Lilly's arguments that Canada's judicial revocations of two new-use pharmaceutical patents had been confiscatory, unfair and inequitable, or discriminatory. However, the tribunal also failed to close the door to the possibility that invalidation of intellectual property rights (IPRs) under domestic law could constitute a violation of international investment law in the future. Nor did it question the possibility that domestic patent laws that are consistent with NAFTA or the World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) could nevertheless be impugned for disappointing expectations of profit under bilateral investment agreements. Accordingly, the claim, heralded by some, that the decision finally buries lingering concerns that "trade tribunals will become supranational courts of appeal over domestic property law disputes" is profoundly misguided – it was at best a temporary, partial, or even pyrrhic victory.

Despite winning the ISDS battle, Canada has conceded the war. Three months after Canada's arbitral victory, the Canadian Supreme Court dramatically loosened its long-standing promise/utility doctrine in *AstraZeneca Canada Inc. v. Apotex, Inc.* There, after a protracted pressure campaign from the United States and the pharmaceutical industry, the Supreme Court of Canada eviscerated the promise/utility doctrine and adopted a much more forgiving test of utility that requires only "a mere scintilla" of evidence.

The lingering effect of the patentability-IP claim in *Eli Lilly* on Canada's policy reversal finds kinship in other IP-based ISDS cases involving a compulsory license in Colombia and data exclusivity in Ukraine. Together they show the chilling effect of a toxic brew of private ISDS claims, relentless pressure from trading partners, and a pharmaceutical industry bent on preserving monopoly profits and IP exclusivities.

Private international law principles for ubiquitous intellectual property infringement – a solution in search of a problem?

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Journal of Private International Law, Vol. 13, No. 1, 2017

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3010021

An empirical study of 56 cases from 19 jurisdictions dealing with a paradigmatic instance of ubiquitous infringement – cross-border online infringement of intellectual property (IP) rights – shows that the typical case will:

- involve a local plaintiff suing a foreign defendant for a foreign action causing local damage to a local IP right (being either a trademark or a copyright);
- neither challenge the validity of the IP right nor involve parallel proceedings elsewhere;
- seek the remedies of injunction and damages, to be enforced locally;
- resolve the issue of jurisdiction by determining whether local consumers have been targeted (in trademark cases) or can access the material (in copyright cases); and
- apply local law without expressly considering some other applicable law.

These findings suggest that the harmonized private international law principles currently being developed for transnational IP disputes may not be necessary, as a matter of practice, in most, if not all, cases.

IP Law & Policy

Lost profits in a multicomponent world

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U Denver Legal Studies Research Paper No. 17-23

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3016814

Given our adversarial system, it is not surprising that plaintiffs advance creative damages theories that would help them maximize their recoveries. In patent law, one recurring tactic is for patentees to seek remedies based on the entire infringing product instead of just the specific feature covered by the patent. This distinction can significantly inflate remedies because modern multicomponent products contain thousands, sometimes hundreds of thousands of different features. Thus, entire products are orders of magnitude larger, more complex and more valuable than individual features.

In recent years, the Supreme Court has sensibly rejected attempts to base patent remedies on entire products in the context of permanent injunctions and design patents. Nonetheless, the Federal Circuit continues to allow patentees to recover all the lost profits associated with an entire infringing product even when the patent at issue only covers one aspect of a multicomponent product. Just this past spring, in *Mentor Graphics v. Eve-USA*, the Federal Circuit affirmed a \$36,417,661 award giving the patentee all the lost profits caused by the sales of the defendant's infringing semiconductor emulator systems even though the patent covered only one feature of the defendant's whole product. The decision explicitly rejected attempts to apportion profits between those attributable to the patented feature and other significant factors.

This Essay argues that the failure to consider apportionment is wrong on both the law and policy. From a doctrinal perspective, the Federal Circuit has misinterpreted deeply rooted Supreme Court precedent to arrive at an overly simplistic “but for” test to assess damages. From a policy perspective awarding lost profits based on the entire infringing product – rather than just the feature – compensates the patentee for value she did not create and deters innovation in technologies that operate with or build upon other technology (“complementary technology”). Accordingly, this Essay argues that it is time to realign lost profits doctrine to make it consistent with other types of patent remedies. Patentees should only be compensated based on the value of the patent they hold. That means focusing the remedy on the infringing feature and not the infringing product.

Are patent fees effective at weeding out low-quality patents?

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3012770

The paper investigates whether patent fees are an effective mechanism to deter the filing of low-quality patent applications. The study analyzes the effect on patent quality of the Patent Law Amendment Act of 1982, which resulted in a substantial increase in patenting fees at the U.S. Patent and Trademark Office. Results from a series of difference-in-differences regressions suggest that the increase in fees led to a weeding out of low-quality patents. About 14 per cent of patents in the lowest quality decile were filtered out, with the effect concentrated in the patents of firms whose overall patent portfolio was medium to large (more than 20 patents). The study has strong policy implications in the current context of concerns about declines in patent quality.

A spatial critique of intellectual property law and policy

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Washington and Lee Law Review, Vol. 74, 2017

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3013306

Although geography has had a longstanding and profound impact on the development of intellectual property law and policy, at both the domestic and international levels, geographical perspectives and spatial analysis have thus far not received much attention from policymakers and commentators. Only recently have we seen greater linkage between these two undeniably connected fields. Even with such linkage, the discussion tends to focus narrowly on specific issues, such as the parallel importation of pharmaceuticals, the protection of geographical indications and the treatment of traditional knowledge and traditional cultural expressions.

This article aims to provide a systematic analysis of the linkage between intellectual property and geography. It begins by recounting how the post-war decline of academic geography in the United States helps explain the limited role of geographical insights and spatial analysis in law and policy debates. It further explores the revival of geographical studies just as intellectual property began to garner greater public attention in the 1980s and the 1990s. The article then notes that geography has had a longstanding and profound impact on the development of intellectual property law and policy. For illustrative purposes, it discusses the principle of territoriality, the doctrine of exhaustion of rights, the protection of geographical indications and the establishment of regional intellectual property norms.

The second half of this article turns to the inadequate use of geographical insights and spatial analysis in the development of intellectual property law and policy. It calls for a more geographically informed analytical approach, which is especially well-suited to addressing the increasing complexities in law and

policy in this area. The article concludes by outlining two approaches that can help improve the use of geography in developing law and policy in this area. Focusing on the dual notion of "spatializing law" and "legalizing space," it underscores the interconnectedness between law and geography.

Copyright Law

Parodies, photocopies, recusals, and alternate copyright histories: the two deadlocked Supreme Court fair use cases

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Syracuse Law Review, Vol. 68, 2017

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3013947

Before any of the Supreme Court's trio of fair use decisions – *Sony v. Universal City Studios*, *Harper & Row v. Nation*, and *Campbell v. Acuff-Rose* – there were the 1958 case of *CBS v. Loew's* and the 1974 case of *Williams & Wilkins v. United States*: two copyright infringement suits that had turned on fair use in the lower courts, and that the Supreme Court had decided to review and had heard argument in. In both of those cases, however, one of the Justices recused himself, and the others deadlocked 4-4, leading to summary affirmance of the lower court judgments. How would the Court have decided those cases without the recusals? How would the decisions have affected the development of copyright and fair use doctrine? And were the recusals justified?

The papers of a number of Justices, combined with other historical materials, provide surprisingly good answers to those questions. In *CBS v. Loew's*, a case in which the Ninth Circuit had held that a Jack Benny parody of the movie *Gaslight* infringed copyright in that work, the Supreme Court voted to reverse. Justice Douglas started to draft an opinion for the Court, only to recuse himself to pursue a business opportunity with CBS that never materialized. In *Williams & Wilkins*, a case in which the Court of Claims had held the photocopying practices of two government libraries to fall within the scope of fair use, the Court would also most likely have reversed, with Justice Blackmun providing the fifth vote to decide that the practices were infringing. However, Blackmun recused himself because the Mayo Clinic, whose employment he had left fifteen years previously, took the position that the photocopying was fair use, and was one of thirteen parties signing on to one of many amicus briefs in the court below. Justice Douglas's recusal, I argue, was unjustified, and Justice Blackmun's dubious at best.

In a world in Douglas and Blackmun had not recused themselves and the Court had decided *CBS* and *Williams & Wilkins*, how could copyright law look different than it now does? I explore that question at three different moments in time. First, I argue that immediately after a *CBS v. Loew's* decision in 1958, there might not have been a fair use doctrine separate from a general inquiry into copyright infringement. Second, I contend that just after a *Williams & Wilkins* decision in 1974, fair use doctrine would likely have focused entirely on what have become known as "productive" or "transformative" uses, while excluding "non-productive" uses and eschewing any distinction between commercial and noncommercial uses. Finally, I consider the present moment, and consider the possible continuing impact of hypothetical decisions in *CBS* and *Williams & Wilkins*. Ultimately, however, my goal is not to prove exactly how *CBS* or *Williams & Wilkins* would have come out, or would have diverted the path of fair use doctrine or copyright infringement analysis. Rather, I am interested in using the materials that are available about those cases, and the realization that the Supreme Court came very close to deciding them, to free up my imagination, and yours, about how copyright law and the fair use doctrine could be different than they are.

The Court of Justice of the European Union creates an EU law of liability for facilitation of copyright infringement: observations on *Brein v. Filmspeler* [C-527/15] (2017) and *Brein v. Ziggo* [C-610/15] (2017)

Jane C. Ginsburg (Columbia Law School)

Forthcoming (in French) in 2016/5-6 Auteurs et Médias 401 (Belgium).

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3024302

After a series of decisions in which the Court of Justice of the European Union appeared to be cutting back on the application of the right of communication to the public with respect to the provision of hyperlinks, the Court's most recent decisions in *Brein v. Filmspeler* (C-527/15) and *Brein v. Ziggo* (C-610/15) concerning, respectively, sale of a device pre-loaded with hyperlinks to illegal streaming sites, and The Pirate Bay BitTorrent platform, indicate instead that the Court's prior caselaw was in fact gradually advancing toward a European harmonization of the law on derivative liability (i.e., liability in the second degree) for violation of the right of communication to the public. These two most recent decisions have now achieved that harmonization. Moreover, harmonization was necessary given both the lack of uniformity regarding secondary liability across the national laws of the member states, and the growing economic importance of furnishing the means to access infringing sources (without serving as the initial source of the infringing communication).

This article will first briefly review of the facts of the cases. It then will examine how the Court's reasoning results in a European law of communication to the public that reaches actors who do not originate illicit communications, but who knowingly facilitate them (I). Next, the analysis will show that the harmonized law of derivative liability can be considered the flip side of the law of non-liability for "the storage of information provided by a recipient of the service,... for the information stored at the request of a recipient of the service" already harmonized by art. 14 of the eCommerce directive 2000/31 (II).

Copyright easements

Jason Mazzone (University of Illinois College of Law)

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3023425

When authors assign the copyright in their work to publishers, some productive uses of the work are impeded. The author loses opportunities to use or to authorize others to use the work unless the publisher consents; the publisher does not permit all uses of the work that the author would like or that would benefit a consuming audience. Copyright easements can solve the problem. Under a system of copyright easements, an easement holder would have designated rights in a creative work that would permit uses of the work that would ordinarily require permission of the copyright owner. If the author later assigns the copyright to a publisher, the copyright is held subject to the rights of the easement holder. The easement thus ties the author's own hands: the author can no longer assign an unfettered copyright — and the publisher can no longer ask for it — because of the existence of the easement holder's interests in the work. Copyright easements can protect the ability of authors, after they assign the copyright, and of others, to make productive uses of works in ways that are unlikely to affect the publisher's economic interests. Copyright easements can also ensure that uses of works that do not require a copyright owner's permission but which publishers frequently seek to prevent, such as fair uses, could occur more easily. Copyright easements thus benefit authors and the public alike. These benefits can be easily and immediately produced without any change to the Copyright Act.

Other IP Topics

License agreements: segmentation within the international market of seeds

Lina María Díaz Vera (Independent)

Revista La Propiedad Inmateria, No. 23, January-June 2017

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3012219

The self-replicating nature of seeds poses a challenge for the traditional configuration of Intellectual property rights, as it overlooks the boundary that prevents amateurs from replicating the technology embedded on it. The territorial scope of IP rights and the lack of an international consensus regarding the exhaustion of IP right aggravates the issue. This loophole enhances the segmentation of markets through license agreements of patents and plant varieties which multinationals employ to drag resources all along the market chain, by demanding payment of fees to each shackle. This might constitute an infringement of Competition Law regimes which is undertaken differently according with the tradition of each country but always with the aim of protecting the well-functioning of their internal market.

The impact of 3D printing on Canadian trademark law: selected issues and potential solutions

James Plotkin (Independent)

The Impact of 3D Printing on Canadian Trademark Law: Selected Issues and Potential Solutions, (2017)

33 CIPR 63 (Canadian Intellectual Property Review)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3022059

The advent of three-dimensional (3D) printing may prove to be the most important technological innovation since the Internet. If and when 3D printing enters the mainstream, a paradigm shift in the way we consume and distribute goods might occur. The technology could enable one to print useful and artistic objects at home, obviating the need for much of the current supply chain for some goods. While 3D printing holds promise, legal and business hurdles lie ahead. Intellectual property (IP) rights holders are sure to be some of the most affected by 3D printing. The IP implications of 3D-printing technology are myriad, transcending patent, trademark, industrial design, and copyright law. Although much of the discussion thus far has centred on patent and copyright law, this article explores and analyzes some of 3D printing's potential impact on Canadian trademark law.

Contentious construction

Joshua L. Simmons (Kirkland & Ellis LLP)

Megan L. McKeown (Kirkland & Ellis LLP)

Landslide, July/August 2017, at 44

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3012666

Language can serve various purposes. For some, it is merely the way humans communicate with each other. For others, it is a set of rules on how to arrange words to permit communication. And for a select few, the creation of new languages is an expressive activity through which ideas about language, both human and computer, are conveyed.

While U.S. copyright protection “subsists . . . in original works of authorship fixed in any tangible medium of expression,” academics have debated whether constructed languages in general—languages that are invented or intentionally devised—and computer languages in particular fit naturally into the copyright system. On the one hand, commentators recognize that “[t]he involvement of a creator with her constructed language does not end when the first book or article describing the language is published.” Instead, the creator is interested in how the language is distributed and developed by subsequent users.

In other words, she (like any author) intuitively possesses a sense of ownership over the work that she has created.

On the other hand, not all effort in creating a new work is entitled to copyright protection. Some commentators have argued that languages, even if they are original and creative, should not receive copyright protection because language is akin to an unprotectable idea that is free for anyone to use. This debate has raged particularly large in considering the copyrightability of computer languages, which some in the academic community believe should be per se uncopyrightable or as minimally protected as possible.

Despite this academic debate, until recently, the U.S. courts had not had the opportunity to consider the issue. That changed when two cases began making their way through the U.S. court system.

SAS Institute Inc. v. World Programming Ltd. concerns the SAS System, “an integrated suite of business software products” that allow users to “access, manage, and analyze data by writing programs in a programming language” called “SAS Language,” and World Programming’s competing system that, among other components, copied the SAS Language.

In contrast to the software issues raised in SAS, Paramount Pictures Corp. v. Axanar Productions, Inc. concerned the creation of a short film titled Star Trek: Prelude to Axanar and a feature film titled Axanar, which are “set in the Star Trek universe twenty-one years before The Original Series.” Paramount alleged that Axanar copied several elements from Paramount’s Star Trek works, including the Klingon language.

This article addresses the debate through a fresh lens in light of recent judicial opinions. Without staking out a position, it summarizes the differing views on critical questions of copyright law related to constructed languages: First, whether constructed languages qualify as “original works of authorship” under the Copyright Act. Second, whether such works would be sufficiently fixed to warrant copyright protection. Third, whether constructed languages are ideas or expression. And finally, how constructed languages might be infringed and whether unauthorized use of a constructed language would constitute fair use.

About the editor

Dr. Anne Layne-Farrar is a vice president in the Antitrust & Competition Economics Practice of CRA. She specializes in antitrust and intellectual property matters, especially where the two issues are combined. She advises clients on competition, intellectual property, regulation, and policy issues across a broad range of industries with a particular focus on high-tech and has worked with some of the largest information technology, communications, and pharmaceuticals companies in the world.

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